No. 96-1578

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HON. THOMAS R. PHILLIPS, HON. RAUL A. GONZALEZ, HON. NATHAN L. HECHT, HON. JOHN CORNYN, HON. CRAIG T. ENOCH, HON. ROSE SPECTOR, HON. PRISCILLA R. OWEN, HON. JAMES A. BAKER, HON. GREG ABBOTT, TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, AND W. FRANK NEWTON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION,

Petitioners,

v.

WASHINGTON LEGAL FOUNDATION, WILLIAM R. SUMMERS, AND MICHAEL J. MAZZONE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

---

RESPONDENTS' MEMORANDUM IN RESPONSE TO THE PETITION

MICHAEL J. MAZZONE
9 Greenway Plaza
Suite 2300
Houston, TX 77046
(713) 940-6001
Pro Se

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

DONALD B. AYER
THOMAS M. FISHER
JONES, DAY, REAVIS & POGUE
1450 G St., N.W.
Washington, DC 20005-2088
(202) 879-3939

Attorneys for Respondents WLF and William R. Summers

Date: May 5, 1997

QUESTIONS PRESENTED

1. Is interest earned on client trust funds held in IOLTA accounts a property interest of the client, cognizable under the First and Fifth Amendments to the U.S. Constitution?

2. Is there a federal general common law on which a U.S. Court of Appeals may rest a determination whether interest earned on client trust funds held by lawyers in IOLTA accounts is a property interest cognizable under the First or Fifth Amendments to the U.S. Constitution, rather than following principles of comity and federalism that require deference to determinations of the issue by the highest appellate court of the state?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 LIST

Aside from the parties named in the caption, the following were Defendants/Appellees in the Court of Appeals: Jack Hightower, Lloyd Doggett, and Bob Gammage. They were named as defendants in the complaint, in their official capacities as justices of the Texas Supreme Court. They are no longer members of the Court, having been replaced, respectively, by Greg Abbott, Priscilla R. Owen, and James A. Baker.

Respondent Washington Legal Foundation has no parent company or nonwholly owned subsidiaries to list pursuant to Supreme Court Rule 29.6.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MEMORANDUM IN RESPONSE TO THE PETITION

The Respondents, Washington Legal Foundation ("WLF"), William R. Summers, and Michael J. Mazzone, respectfully file this memorandum in partial support of Petitioners' prayer that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-captioned case on September 12, 1996. Respondents support granting the writ on Question One, but oppose certiorari on Question Two.

STATEMENT OF THE CASE

Texas, like all other states and the District of Columbia, has established an IOLTA ("Interest On Lawyers' Trust Accounts") program.[1] The Texas IOLTA program generates funds to be used for legal services to indigents by requiring lawyers to deposit nominal client funds and client funds held for a short duration into special IOLTA interest-bearing accounts. As with the IOLTA programs in another twenty-five states, attorney and client participation in the Texas IOLTA program is mandatory.

More particularly, the IOLTA program requires that client funds must be deposited into an attorney's IOLTA account if they are unable to generate "net interest," that is, interest exceeding the cost of accounting for the funds and bank service charges. *Rules Governing the Operation of the Texas Equal Access to Justice Program*, no. 6. Also, the rules of the Texas IOLTA program specify that "net interest" is to be determined "without regard to funds of other clients which may be held by the attorney." *Id.* Once a lawyer makes a good-faith determination that his client's funds will be unable to generate "net interest" on their own, the lawyer must pool those funds with other nominal

---

[1] As Petitioners note, Indiana, while it has established a mandatory IOLTA program, has yet to implement its program. The Indiana Supreme Court originally refused to allow an IOLTA program because it viewed participation in such programs as a breach of an attorney's fiduciary duty. *In the Matter of Indiana State Bar Association's Petition To Authorize A Program Governing Interest On Lawyers' Trust Accounts*, 550 N.E.2d 311 (Ind. 1990).

or short term funds that he holds for his other clients in a single IOLTA account. The entire body of interest from these pooled funds is then required to be paid to Petitioner Texas Equal Access to Justice Foundation ("TEAJF"), who distributes the funds earned from IOLTA accounts to a variety of organizations that provide civil legal services to indigents.

The individual Respondents in this case are a lawyer and a client, both of whom are impacted by the Texas IOLTA program and who object to its application to them. Michael J. Mazzone is an attorney licensed to practice law in the State of Texas. Mr. Mazzone maintains an IOLTA account into which he regularly places client trust funds that are either nominal in amount or are reasonably anticipated to be held for a short period of time. Mr. Mazzone has determined from experience that as a practical matter he cannot operate his law practice without collecting client funds that, according to the rules of the Texas IOLTA program, must be placed into an IOLTA account.

William J. Summers is a citizen of Texas who currently has funds being held in an IOLTA account. In December 1992, Mr. Summers was named as a defendant in civil litigation that arose in connection with his business. Mr. Summers agreed to pay his attorney a retainer. However, as part of the agreement, Mr. Summers' attorney bills him periodically for services rendered, rather than drawing on the retainer. It is Mr. Summers's understanding that his attorney would draw against the retainer only if he fails to pay his legal bills in a timely manner. The litigation is ongoing, and Mr. Summers's attorney continues to hold the retainer.

In January 1994, Mr. Summers's attorney informed him for the first time that he had deposited the retainer into his law firm's IOLTA account and that all interest earned on that account is paid to the TEAJF in order to support Texas's IOLTA program. Mr. Summers informed his attorney that he did not want his funds used to support the IOLTA program and thus objected to the placement of his retainer into an IOLTA account. The attorney

responded that, due to the relatively small size of the retainer, he was required by state law to keep the funds in that account.

Respondent WLF is a public interest law firm whose members include Texas lawyers similarly situated to Mr. Mazzone and Texas citizens similarly situated to Mr. Summers.

Because the Texas IOLTA program mandates that attorneys and their clients participate in this method of funding legal services for indigents, Respondents brought this case in district court against the Justices of the Texas Supreme Court, who promulgated the Rules of the Texas IOLTA program; against the TEAJF, which administers the program; and against W. Frank Newton, in his capacity as Chairman of TEAJF, to challenge the constitutionality of the IOLTA scheme.

In the district court, Respondents urged three theories for finding the Texas IOLTA program unconstitutional. First, Respondents argued that any interest earned on client funds sitting in an IOLTA account belongs to the client, regardless of whether those funds could have earned "net interest" on their own. Accordingly, when the Texas IOLTA program appropriates that interest, as it has done with interest earned on Mr. Summers's retainer, it takes the client's property without providing just compensation, in violation of the Takings Clause of the Fifth Amendment.

Second, regardless of who owns the interest generated on client funds deposited into an IOLTA account, the client certainly has a property right in the principal deposit. One of the incidents of ownership of property is the right to exclude others from using it. When the Texas IOLTA program requires clients such as Mr. Summers to deposit funds in an IOLTA account for the benefit of the TEAJF and its beneficiary donees, it deprives those clients of the right to exclude others from using their property. In this way, also, the Texas IOLTA program violates the Takings Clause of the Fifth Amendment.

Finally, Respondents argued before the district court that the Texas IOLTA program compels them to support programs with

which they do not agree. Many of the programs to which the TEAJF distributes money have substantial expressive content. For example, TEAJF's 1991/92 annual report states that in 1992 the TEAJF granted $100,000 to the Texas Appellate Practice & Educational Resource Center to represent death row inmates seeking to overturn their death sentences through federal habeas corpus actions. And many groups have received grants from the TEAJF to represent undocumented aliens seeking political asylum in order to avoid deportation. Both Mr. Summers and Mr. Mazzone oppose the objectives of some of the litigation activity for which IOLTA funds are earmarked, and thus object to the use of their funds (or, in the case of Mr. Mazzone, the use of his clients' funds) to support those activities. In using interest generated on the principal deposits of Mr. Summers and Mr. Mazzone's clients to support these programs, the Texas IOLTA program compels their financial support of these services, in violation of the First Amendment.

The district court rejected all three of these theories when it denied Respondents' motion for summary judgment and granted Petitioners' motion for summary judgment. Petition Appendix ("Pet. App.") 20a-40a. First, the court ruled that the Respondents have no property right in the interest earned on their IOLTA deposits that is cognizable under the Fifth Amendment. Without the IOLTA program's mandatory pooling of the nominal and short-term client funds, the court held, no interest could be earned on such funds. *Id.* at 30a. Second, Respondents' lack of such property right also defeated their First Amendment claims, according to the district court. Finally, the court ruled that the Respondents could not assert the right to exclusive use of the principal deposits because such exclusive use was not necessary to preserve the property right in the principal. *Id.* at 8.

On appeal, the Fifth Circuit concluded that under the First and Fifth Amendments, clients do maintain a property right in the interest earned on their principal deposits that are pooled into

IOLTA accounts.[2] Pet. App. 1a-19a. This property right inheres to the owner of the principal regardless of whether "for practical banking reasons, the interest earned in trust accounts could []ever accrue to the clients." *Id.* 14a. Accordingly, the court reversed the district court's orders denying Respondents' motion for summary judgment and granting Petitioners' motion for summary judgment, and remanded the case to the district court for further proceedings. The Fifth Circuit subsequently rejected, over a six-member dissent, a Petition for Panel Rehearing and a Suggestion for Rehearing *En Banc*. Pet. App. 41a-52a.

REASONS FOR GRANTING THE WRIT ON QUESTION ONE

Respondents support granting the writ on Question One, but submit that the Fifth Circuit's decision reversing the district court should ultimately be affirmed.

Mandatory IOLTA programs tout their success at deriving something from nothing, at finding money where there was none before. Through this mystical triumph, states have derived a method of funding services, typically legal services for the poor, without, Petitioners insist, forcing anyone to pay for them. The Fifth Circuit compared this apparent success to the art of alchemy. *Id.* at 15a (citing AMERICAN BAR ASS'N, CIVIL JUSTICE: AN AGENDA FOR THE 1990's, 56-72 (1989). And like

---

[2] The Fifth Circuit did not address Respondents' alternative takings argument: whether the Texas IOLTA program deprives clients with deposits in IOLTA accounts of the right to exclude others from benefiting from their property. Thus, contrary to Petitioners' assertion, Pet. 6, if this Court reverses the Fifth Circuit, it should remand the case for further consideration by the Fifth Circuit of Respondents' alternative takings theory. In addition, in the event this Court rejects the proposition that clients have a property right in the interest earned on such deposits regardless of whether they could accumulate that interest absent the IOLTA structure, the lower courts would need to address whether the clients could in fact accumulate interest on short-term and nominal deposits absent the strictures of the IOLTA regulations.

alchemy, of course, the ability of IOLTA plans to create money from nothing to fund legal services for the poor is merely an illusion.

In this case, the Fifth Circuit correctly concluded that the interest earned on funds in IOLTA accounts already belongs to someone--to the clients who own the principal. However, before the Fifth Circuit's decision in this case, the Eleventh and First Circuits had held that clients do not have a property right in the interest earned on their IOLTA deposits. *See, e.g., Cone v. State Bar of Florida*, 819 F.2d 1002, 1006-07 (11th Cir.), *cert. denied*, 484 U.S. 917 (1987); *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 979 (1st Cir. 1993).[3] Thus, the circuits are in conflict over this issue, which bears directly upon programs established now in every state. Because the conflict is clear, and the issue is likely to recur and is squarely presented by the decision below, respondents agree that this Court should grant review of the first issue.

[3] As Petitioners note, Pet. 5, the California Court of Appeal considered this issue in *Carroll v. State Bar of Cal.*, 166 Cal. App. 3d 1193, 213 Cal Rptr. 305 (Cal. Ct. App. 1984), *cert. denied sub nom., Chapman v. State Bar of California*, 474 U.S. 848 (1985). That court upheld California's IOLTA program against constitutional challenge. Petitioner also assert that cases from six other states have held similarly. Pet. 5. However, none of the other cases cited by Petitioners represents an opinion arising from a case or controversy. All of them are non-adversarial advisory opinions supporting the initial creation of IOLTA programs in their respective states.

I. THIS COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUITS OVER WHETHER THE HOLDING OF THIS COURT IN *WEBB'S FABULOUS PHARMACIES*, EXTENDING CONSTITUTIONAL PROTECTION AGAINST STATE APPROPRIATION OF INTEREST ON INTERPLEADER ACCOUNTS, APPLIES TO INTEREST EARNED ON CLIENTS' FUNDS DEPOSITED INTO IOLTA ACCOUNTS

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980), this Court held that "[t]he earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." On that basis, the Court invalidated the action of a circuit court clerk in appropriating interest on the account, on the ground that such action amounted to an unconstitutional taking from the owners of the principal. The applicability of *Webb's* to the IOLTA context is at the heart of the circuit conflict presented here. In this case, the Fifth Circuit recognized a property right cognizable under the Fifth and First Amendments in the interest earned on their principal deposits in IOLTA accounts. In doing so, it acted in direct contradiction of the Eleventh and First Circuits, which have declined to apply *Webb's* to IOLTA programs and which have concluded that clients do not have a property right to the interest earned on their deposits in IOLTA accounts.

In *Cone v. State Bar of Florida*, 819 F.2d 1002, the Eleventh Circuit passed on the issue whether IOLTA unconstitutionally interfered with the property rights of the clients whose funds were deposited into IOLTA accounts. Though the program examined by the Eleventh Circuit was not mandatory, the court had to decide whether the interest earned on the client's IOLTA deposit was her property. The district court in *Cone* had concluded that a client does not have a protectable property right in the IOLTA interest, and the Eleventh Circuit affirmed. The *Cone* court distinguished *Webb's* because "the interest earned on the . . . funds [at issue in *Webb's*] did give rise to a legitimate claim of entitlement" because the $90,000 of interest earned on the funds was sufficient to lead to a "legitimate expectation of interest

exclusive of administrative costs and expenses." *Id.* at 1007. However, "the crucial distinction," according to the Eleventh Circuit, was "not the amount of interest earned, but that the circumstances led to a legitimate expectation of interest . . . ." *Id.*

In *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, plaintiffs challenged Massachusetts' mandatory IOLTA program under the First and Fifth Amendments, and the First Circuit focused on the existence of a property right to IOLTA interest as relevant in the First Amendment compulsory speech context.[4] The court concluded that "[t]he interest generated by funds deposited in IOLTA accounts is not the clients' money." *Id.* at 980. In fact, the court noted, because such interest "belongs to no one, but has been assigned . . . to be used by the IOLTA program," *id.*, the state had not compelled the plaintiffs' financial support for the IOLTA program. *Id.* Further, the First Circuit also distinguished *Webb's* based on plaintiffs' lack of any property right to the interest earned on the IOLTA-deposited funds, citing the *Cone* case in its discussion. *Id.* at 975.

The reasoning of the *Cone* and *Massachusetts Bar Foundation* cases directly conflicts with the decision below. In this case, the Fifth Circuit, applying *Webb's*, concluded that clients have a property interest in the interest earned on their principal funds deposited into IOLTA accounts. The court recognized that Texas follows "the traditional rule that 'interest follows principal,' which recognizes that interest earned on a deposit of principal belongs to the owner of the principal." Pet. App. 8a (citing *Sellers v. Harris Co.*, 483 S.W.2d 242, 243 (Tex. 1972)). Further, this Court had established in *Webb's* "a rule that is independent of the amount or value of the interest at issue, holding that a property interest existed in the accrued interest simply because '[t]he

---

[4] The Takings Clause issue was decided solely on the theory that the plaintiffs were denied the exclusive use of their property. *Massachusetts Bar Foundation*, 993 F.2d at 973-76. That issue is not presented to this Court.

earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property.'" *Id.* at 12a (quoting *Webb's*, 449 U.S. at 164). Thus, despite any inability of IOLTA-deposited funds to earn interest in excess of administrative costs, any interest they do earn is the property of the owner of the funds, not the property of the state. Pet. App. 7a.

Accordingly, there is a clear conflict between the First and Eleventh Circuits, on the one hand, and the Fifth Circuit, on the other, over whether interest earned on IOLTA accounts involves a protectable property interest of the owners of the principal. And though a decision by this Court would not result in a final judgment in this case, it would resolve the precise issue on which the circuits are in conflict. The issues remaining in this case are of minimal importance compared to the issue presented here. This court should resolve the dispute.

II. WHETHER IOLTA ACCOUNT INTEREST IS PROTECTED PROPERTY OF THE CLIENTS IS AN IMPORTANT AND RECURRING LEGAL QUESTION

Programs similar to the Texas IOLTA program at issue here are in operation in all but one of the states and the District of Columbia, and the last state, Indiana, is putting one in place at the present time. Thus, on a routine basis, in nearly every jurisdiction in America, lawyers and their clients turn over the interest earned on nominal and short-term client funds to organizations that fund legal services for the poor. As Petitioners note, this pervasive IOLTA movement annually funds legal services for 1.7 million people nationwide (130,000 in Texas alone). Pet. 3. In doing so, IOLTA programs have appropriated as much as $150 million annually (nearly $10 million annually in recent years in Texas alone) of interest earned on nominal and short-term client deposits. Henry J. Reske, *IOLTA Dividends In Doubt: Ruling Threatens Program That Distributes Legal Aid Funds From*

Interest On Lawyers' Trust Accounts, ABA JOURNAL, Nov. 1996, at 30.[5]

Furthermore, this issue is not necessarily limited to lawyers and their clients. In view of the amazing ability of IOLTA programs to generate "free" money, the Fifth Circuit was on target in this case when it raised the specter of "incit[ing] a new gold rush, encouraging government agencies to dissect banking regulations to discover other anomalies that lead to 'unclaimed' interest." Pet. App. 15a. The Supreme Court of the State of Washington, for example, has promulgated a program similar to IOLTA for "limited practice officers," that is, nonlawyers who "select, prepare, and complete legal documents incident to the closing of real estate and personal property transactions . . . ." Wa. R. Adm. P. 12, 12.1. Such officers must deposit nominal or short-term funds received in connection with closings in a pooled, interest-bearing account, the interest from which is payable to the Legal Foundation of Washington. Wa. R. Adm. P. 12.1 (c)(1). Thus, states are discovering ways to find and capitalize on banking anomalies in other sectors of the economy.

---

[5] Currently, the IOLTA programs in about 26 states are mandatory, or "comprehensive," Brennan J. Torregrossa, *Washington Legal Foundation v. Texas Equal Access to Justice Foundation: Is There an IOTA of Property Interest in IOLTA?*, 42 VILL. L. REV. 189, 221 (1997), and that number is likely to grow. As the history of Texas's IOLTA program demonstrates, the greater IOLTA revenues generated by a mandatory program are simply too tempting to forgo. The record in this case shows that the Texas IOLTA program was voluntary for four years, during which time the TEAJF distributed only about $2.3 million in grants. Since the program became mandatory in 1988, however, the TEAJF has distributed over $40 million in grants. Moreover, the ABA House of Delegates, no doubt recognizing that great reservoirs of "free" money would remain untapped if IOLTA programs were to remain voluntary, recommended in 1988 that all states with voluntary IOLTA programs should switch to mandatory programs. *Id.*

The Fifth Circuit also noted an additional reservoir of such "unclaimed" interest: the interest credit unions earn on deposited checks during the period before the check clears with the payor bank. Pet. App. 15a-16a. Check deposits generally take one or two days to clear the payor bank, during which time credit unions carry provisional credits for the deposited funds. The depository institution effectively has use of the deposited money during the float period, but credit unions are not required to pay the small amount of interest that would otherwise accrue to the depositor until the check clears. *Id.*; *see also*, 12 U.S.C. § 4005(b). But that should not mean the float-period interest is free game for the government to absorb.

The more technology speeds the transfer of monetary transactions, the more frequently interest earned during funds transfer and float periods will be measured in pennies or less and "the more and more difficult it will be for individuals to make a practical claim to such funds." Pet. App. 15a. Advances in technology should not mean that such interest belongs to no one. It belongs to the owner of the principal unless, as often happens in the context of bank deposits of clients' short-term and nominal funds, the bank customer chooses to allow the bank to keep the nominal interest in view of the expense of administering and accounting for such sums. *See id.*

This case squarely presents the issue whether interest earned on clients' nominal and short-term deposits into IOLTA accounts belongs to the clients. No further proceedings below could develop facts instructive on this narrow issue. It is a purely legal question, and one that is fundamental to the further conduct of the case. *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). Given the great volume of IOLTA transactions at present, and the broad implications and potential applications of the government action authorized in the IOLTA context, review by this Court is necessary.

REASONS FOR DENYING THE WRIT ON QUESTION TWO

Although Question One presented by Petitioners is worthy of this Court's certiorari jurisdiction, Question Two, whether general federal common law governs the case, is not.

I. QUESTION TWO IS NOT PRESENTED IN THIS CASE BECAUSE THE FIFTH CIRCUIT EXPLICITLY LOOKED TO TEXAS LAW TO DECIDE THAT INTEREST FOLLOWS PRINCIPAL

Petitioners' invocation of federal common law here is wholly out of place. The only issue before this Court is the Fifth Circuit's treatment of federal constitutional law, or, more precisely, its treatment of the Takings Clause jurisprudence already defined by this Court in *Webb's*.[6] Whether *Webb's* applies in the IOLTA context is squarely presented in Question One. As the applicability of federal common law was not raised below, Question Two is not presented in this case and adds nothing to the resolution of the constitutionality of Texas' IOLTA program.

This Court has made it quite clear that "[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court." *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988); *Adams v. Robertson*, 117 S. Ct. 1028 (1997). Contrary to the position taken by Petitioners, the Fifth Circuit explicitly relied on Texas law in deciding this case. The court began its discussion of the legal principles underlying this case as follows:

> State law defines "property" and the United States Constitution protects private property from government encroachment. Texas observes the traditional rule that

---

[6] Indeed, the Eleventh and First Circuits, in deciding that interest earned on client funds deposited into IOLTA accounts did not belong to clients, did not rely on the applicability of federal general common law; instead, they rejected the applicability of *Webb's*. *See Cone*, 819 F.2d at 1007; *Massachusetts Bar Foundation*, 993 F.2d at 975-76.

> "interest follows principal," which recognizes that interest earned on a deposit of principal belongs to the owner of the principal.

Pet. App. 8a (citing *Sellers v. Harris County*, 483 S.W.2d at 243 (footnotes omitted)). The Fifth Circuit could not have understood more plainly or followed more dutifully its obligation to look to state law for the parameters of private property. The court's opinion does not even mention the phenomenon of "general federal common law," much less make an attempt to resolve what that law might be.

Moreover, after reviewing the panel's opinion and reasoning in this case, Petitioners did not present this federal common law issue for the Fifth Circuit to consider upon rehearing. Their failure to do so undermines any claim that they are forced by virtue of the Fifth Circuit's reasoning to present this issue to the Court; instead, Petitioners are merely searching for a way to cast the Fifth Circuit's decision in the worst possible light. However, this issue is a red herring whose only effect could be to obfuscate the real issues and confuse the Court.

Petitioners pose the general federal common law issue for two possible reasons. First, under the doctrine announced in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), there is no *general* federal common law; to the extent the Fifth Circuit relied on such a body of law, it must necessarily have decided this case improperly. Second, even if Petitioners are taken as referring to the creation of a narrow category of federal common law, any such action would be proper only upon meeting a heavy burden. As detailed by this Court in *Boyle v. United Technologies*, 487 U.S. 500 (1988), a party seeking to vindicate rights by establishing a body of federal common law must first show that the relevant area of law is one of "uniquely federal interest." In addition, the party must persuade the court that a "significant conflict" exists between an "identifiable federal policy or interest and the [operation] of state law," or the application of state law would "frustrate specific objectives" of federal legislation. *Id.* at

507 (quotations omitted). Petitioners may wish to cast the Fifth Circuit's opinion as failing to weigh this heavy burden.

However, the Fifth Circuit decided this case on neither general federal common law nor on the sort of federal common law contemplated in *Boyle*. *Webb's*, the basis for the Fifth Circuit's decision, is a constitutional law case, not a federal common law case. It settled that the Fifth Amendment requires states to abide by the parameters of their own definitions of property: "a State, by *ipse dixit*, may not transform private property into public property without compensation." 494 U.S. at 164. And while constitutional law may be common law in the sense that constitutional cases use *stare decisis* as a means of shaping general legal principles to fit detailed factual situations, there is a clear distinction between invoking the Constitution as a basis for decision and invoking federal common law in substantive areas, such as product liability, that do not refer directly to the Constitution for guiding principles. The Fifth Circuit, like *Webb's*, decided this case as a matter of constitutional law.

Accordingly, because the Fifth Circuit did not decide this case based on federal common law, this Court should deny the writ as to Question Two.

CONCLUSION

For the foregoing reasons, the Petition should be granted as to Question One and denied as to Question Two.

Respectfully submitted,

MICHAEL J. MAZZONE
9 Greenway Plaza
Suite 2300
Houston, TX 77046
(713) 940-6001
Pro Se

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

DONALD B. AYER
THOMAS M. FISHER
JONES, DAY, REAVIS & POGUE
1450 G St., NW, Suite 700
Washington, DC 20005-2088
(202) 879-3939

Attorneys for Respondents WLF and William R. Summers

May 5, 1997